

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

JOHNNY N. MACIAS,

Plaintiff(s),

vs.

READY PAC, INC.; US DEPARTMENT
OF AGRICULTURE;
WAL-MART STORES,

Defendant(s).

2:08-CV-0037-RLH-RJJ

ORDER

(Motions to Dismiss--## 5, 8, 11)

Before the Court is **Defendant READY PAC PRODUCE, INC.'s Motion to Dismiss or to Strike or for a More Definite Statement of Plaintiff's Complaint** (#5, filed January 30, 2008), and two identical motions by Wal-Mart entitled **Defendant Wal-Mart Stores, Inc.'s Motion to Dismiss or to Strike or for a More Definite Statement of Plaintiff's Complaint and Joinder in Ready Pac Produce, Inc.'s Motion . . .** (## 8 and 11). (Wal-Mart's counsel, who is also Ready Pac's counsel, appears to have a habit of filing documents twice.) Plaintiff filed his Response to Defendants' Motions (#15). Defendant Ready Pac filed a Reply (#16). Wal-Mart filed a (actually 2) Joinder (## 18 and 20). Finally, Plaintiff filed an Opposition to Defendant's Reply (#22), and the matter was submitted for decision.

The motions assert that Plaintiff fails to state a claim recoverable under 42 U.S.C. § 1983, pursuant to Fed. R. Civ. P. 12(b)(6), because the moving Defendants were not acting under color of law and no right established by the Constitution or the laws of the United States was

1 violated. The motions will be granted. Plaintiff simply has filed this lawsuit under the wrong law
 2 and in the wrong jurisdiction. If there is a cause of action, it is one for negligence and one which
 3 should be filed in the state court.

4 BACKGROUND

5 Plaintiff alleges that while at work at the Henderson Executive Airport, on October
 6 7, 2007, he was eating a Ready Pac Bistro-Chicken Caesar Salad at work. While doing so he
 7 observed a white wadded up substance in the salad purchased from Wal-Mart, picked it out of the
 8 salad and identified it as a finger from a rubber glove. (Some of his claims suggest there might have
 9 been an actual severed finger in the finger portion of the rubber glove, but that is neither clear nor
 10 relevant.) He brings his suit on the basis of 42 U.S.C. § 1983. That statute provides, in pertinent
 11 part, as follows:

12 Every person who, under color of any statute . . . of any State . . . subjects, or causes
 13 to be subjected, any citizen of the United States or other person . . . to the depriva-
 14 tion of any rights, privileges, or immunities secured by the Constitution and laws,
 shall be liable to the party injured. . . .

15 DISCUSSION

16 **I. Motion to Dismiss Standard**

17 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may
 18 dismiss a complaint for “failure to state a claim upon which relief can be granted.” In a motion to
 19 dismiss, a complaint must contain factual allegations that are sufficient “enough to raise a right to
 20 relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).
 21 All factual allegations set forth in the complaint “are taken as true and construed in the light most
 22 favorable to [p]laintiffs.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999).
 23 However, a court does not assume the truth of legal conclusions merely because the plaintiff casts
 24 them in the form of factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,
 25 1139 (9th Cir. 2003).

26 ////

II. Requirements of Section 1983

The clear language of the statute requires that the cause of action lies against a *person*. Neither company is a person under the definition of the statute.

The statute requires that the person be acting “under the color of law.” Specifically, that person must be acting “under the color of *state* law.” The two phrases are used interchangeably by the U.S. Supreme Court and the Ninth Circuit Court of Appeals. *Compare, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994), and *Azer v. Connell*, 306 F.3d 930, 935 (9th Cir. 2002) (using “under color of law”) with *Nelson v. Campbell*, 541 U.S. 637, 643 (2004), and *Meyers v. Redwood City*, 400 F.3d 765, 770 (9th Cir. 2005) (using “under color of state law”).

Plaintiff bases his claim on the Declaration of Independence and federal food safety standards, although he does mention the Constitution of the State of Nevada for good measure.

Plaintiff apparently fails to understand what it means to act under the color of law. The Court will try to explain it in as simple terms as possible. A person acts under color of state law when the person acts, or claims to act, as a state or local government official in the performance of his or her official duties under any state, county, or municipal law. That is, the person committing the act must be performing the act as a state, county or municipal officer, or pretending that he or she is acting in that capacity. The fact that a person may violate a state, county or municipal ordinance, does not mean that they are acting in an official capacity. For example, even a lawyer, although he or she is licensed by the state, when representing a client in court, is not acting “under the color of law.” *Polk County v. Dodson*, 454 U.S. 312, 319 n.9 (1981) (Even a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.).

Here, both Ready Pac and Wal-Mart are private companies, acting as private parties, and are not acting under color of law, notwithstanding they may be governed by certain standards

////

////

1 established by either the state or federal government.¹ Accordingly, they were not acting and do not
 2 act “under color of state law,” and a Section 1983 claim does not and cannot lie against them.

3 Plaintiff also has failed to claim an injury from any deprivation of a particular right
 4 under the Constitution of the United States or the laws of the United States. Dissatisfaction with the
 5 food, or with finding a foreign object in food he purchased is not, in and of itself, the requisite
 6 violation, nor is there any claim—other than emotional distress—of injury therefrom. He apparently
 7 found it very quickly and removed it. He did not ingest it, nor was Plaintiff treated for any injury
 8 resulting from it.

9 Therefore, even assuming all that Plaintiff claims is true, he has failed to state a
 10 claim under 42 U.S.C. § 1983 upon which he can obtain relief. Accordingly, his complaint must be
 11 dismissed and no amendment could cure the defects.

12 **III. Discussion of Plaintiff’s Points in Opposition**

13 The United States Constitution, not the Declaration of Independence, is the funda-
 14 mental federal law of the land. The natural rights of liberty, the acquiring and enjoyment of
 15 property, and the pursuit of happiness have not been violated by the purported conduct of the
 16 Defendants here.

17 Scallions sold to Taco Bell, E-Coli outbreaks from contaminated vegetables or
 18 meats, or lawsuits over alleged unfair competition, have no relevance to this case or to these
 19 motions. Nor is there any relevance to the number of times Ready Pac has been sued. There is no
 20 evidence that Plaintiff’s food was *poisoned* by the object in his salad.

21 ////

22 ////

24 1

25 Although the US Department of Agriculture is not a party to these motions and has not
 26 entered an appearance, it, too, would be subject to dismissal because it acts under federal law and
 not under state law. Thus, it is not a proper defendant in a Section 1983 case.

